Nos. 18510 to 18519, 18521 to 18531, and 18533

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

JANICE WIENER, *et al.*; UNITED AIR LINES, INC.,

Appellees.

REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA.

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TABLE OF AUTHORITIES CITED

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Preliminary Statement.

This reply brief is in response to appellees' briefs filed by the plaintiff appellees and United Air Lines, Inc., respectively. References to the record, reporter's transcript, and parties, and abbreviations thereof, conform to such references used in previous briefs by all parties.

To the extent that United's Brief as Appellee (Un. Br. p. 3) suggests that the operation of jet aircraft at Nellis Air Force Base was reckless or irresponsible, the Government refers the court to its Opening Brief, wherein it is pointed out with record references that such characterizations were only from United witnesses, and were not supported by any evidence in the record (Govt. Op. Br. pp. 46-47).

The Discretionary Function Exception as It Applies to the Nellis Command to Nellis Pilots and VFR Control.

In its opening brief as appellant the Government assigned as error the trial court's Finding No. 81, which found *inter alia* that each of the negligent acts and omissions on the part of the Government fell within the ambit of the Tort Claims Act and outside of the discretionary function exception thereto.

In the course of its Argument in its opening brief the Government set forth AFR 55-19 [Ex. U-5; Govt. Op. Br., Appxs. B and C] as indicative of the discretion inherent in that order to be exercised in its execution by the Commander of Nellis Air Force Base (Nellis Command). The Government then demonstrated how the Nellis Command exercised such discretion in the promulgation of Wing Supplement-1 [Ex. U-4; Govt. Op. Br. Appx. D].

The Government then pointed out that Training & Operations Memorandum 51-8 [Court's Ex. A (Brown Book); Govt. Op. Br. Ex. E] was concerned with the control of practice instrument approached by Nellis VFR Control and pilots; that it restricted VFR Control personnel and pilots to adhere to the directives contained in that order without any discretion or authority to do otherwise.

Summarily stated, it is the Government's position that Nellis Command had discretion in the establishment and continued use of KRAM and exercised it; that as far as obtaining IFR clearances or traffic information was concerned Nellis VFR Control and pilots had no

discretion to exercise. The District Court found, in effect, that Nellis Command negligently exercised its discretion,[1] and that Nellis VFR Control personnel and pilots had discretion, should have exercised it, but didn't.[2]

In the Government's view, the question presented on this appeal is whether the trial court erred in its application of the discretionary function exception to the foregoing acts of Nellis Command, Nellis VFR Control, and pilots.

The District Court did not characterize the acts of Nellis Command or Nellis Command personnel as being on the "operational" level as distinguished from the "planning" level. The Government submits that there is no occasion to go beyond that portion of *United States v. Dalehite,* 346 U. S. 15, which is as authoritative today as the day it was written, when the Court said (pp. 35-36):

> "It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. *It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations* [applicable to Nellis Command]. Where there is room for policy judgment and decision there is discretion. It necessarily follows that *acts of subordinates in carrying out the operations of government in accordance*

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[1]FF. 28, 47, 48, 49, 50, 51, 53, 55, 56, 60, 61, 67, 68; Government's Opening Brief, Appendix A.

[2]FF. 26, 27, 29, 30, 52, 54, 66, 69; Government's Opening Brief, Appendix A.

> *with official directions cannot be actionable* [Nellis Command; Nellis VFR Control personnel and pilots]." (Emphasis added.)

The foregoing holding in *Dalehite* fits precisely the acts of the Nellis Command in the establishment and use of the KRAM procedure, and similarly fits the actions of Nellis VFR Control personnel and pilots pertaining to the obtaining of IFR clearances and traffic information.

Although, as previously indicated, the Government contends that consideration of the distinction between "operational" and "planning" level decisions is not material to these appeals, the concept of the distinction is misplaced by plaintiff appellees and United. Plaintiff appellees would limit the application of the exception to Cabinet level decisions (Plaintiff Appellees' Br. 55). United admits the exception has somewhat wider application (Appellee United's Br. p. 8). However, both ignore the latitude expressed in *Dalehite* and quoted above.

As this court pointed out in *United States v. Hunsucker,* 9 Cir. 1962, 314 F. 2d 98, 104, Fn. 11:

> "The Supreme Court furnished no criteria as to what is activity at the operational level. From the cases considered, the question would seem to be whether in the light of the facts presented imposition of liability on the government would be consonant with the purpose of the Act."

The Government submits that the Commander of Nellis Air Force Base was not an "operational level" personnel, and the propriety of the exception in his case remains a question of *function* rather than *position.*

The Nellis Commander was familiar with the Air Force training mission as it applied to Nellis Air Force Base, and the practical considerations of feasibility which underlay decisions of the Nellis Command are no different than the decision not to line a canal so as to make it break-proof. *Ure v. United States,* 9 Cir. 1955, 225 F. 2d 709, 712. In the latter case on-the-job Government engineers made the decision ultimately resulting in a calamity. Certainly their status is no different than the Nellis Command responsible for the KRAM procedure. This court in *Ure,* at 713, held the conduct to be "clearly" within the discretionary function exception. The various incidents of the KRAM procedure under attack by appellees are directly traceable to the establishment of "plans, specifications or schedules of operations" (*Dalehite v. United States,* 346 U. S. 15, 35-36). The Government submits that there is no essential distinction between the *Dalehite* facts, the *Ure* facts, and the instant cases.

Appellees have placed themselves in the programming shoes at Nellis. Those responsible for formulating a feasible training program, designed to prepare pilots for combat readiness, determined that two-man crews would conduct instrument letdown procedures, and made a *policy* decision. When the determination was made to have the KRAM procedure conducted without the pilots obtaining IFR clearances or traffic information regarding civilian air traffic, the decision to do so embodied discretion. Contrary to the contentions of appellees, and as the Government has pointed out in its opening brief, the evidence is replete with instances of "determinations made by executives . . . in establishing

plans, specifications, or schedules of operations." (*Dalehite v. United States,* 346 U. S. 15, 35-36).

Plaintiff appellees and United both assert that the Nellis Command disregarded or negligently performed Air Force Regulations, specifically AFR 55-19. However, their position begs the question. If a required act is performed negligently, or if a required act is not performed at all is immaterial if the required act comes within the discretionary function exception. *Builders Corporation of America v. United States,* 9 Cir. 1963, 320 F. 2d 425. However, discretionary function aside, the Government, like any private party or corporation, is bound only by the standard of reasonable care which is set forth in the Civil Air Regulations and not by internal regulations of the Air Force. From this point of view, reliance by appellees upon a breach of such regulations does not provide sufficient foundation to uphold the trial court's findings, especially as to the Government's defense of discretionary function.

As this court has indicated, since the legal standard of care to be exercised by the Government is fixed by law, such standard cannot be varied by adoption of rules for the guidance of its employees. *Kirk v. United States,* 9 Cir. 1959, 270 F. 2d 110. The *Kirk* case presents a factual pattern substantially similar to the cases at bar. There, a plaintiff was injured on a construction site where United States Army Regulations, relating to safety, were incorporated in the general contract.

> "The United States was represented on the project by inspectors whose duty it was to see that the contract provisions were complied with by the

contractors, including the safety provisions contained in Article 30 [accident prevention]. . . ." 270 F. 2d 110, 116.

This court framed the gist of plaintiffs' allegations as follows:

"While appellants rely on many specifications of error, they largely revolve around appellants' main contention which is that the United States was under a legal duty to Kirk to inspect and test the scaffold and movable forms and to carry out a continuous and comprehensive accident prevention and rescue program for the protection not only of the employees of the United States but of the employees of the independent contractors, of which Kirk was one. *Appellants argue that such legal duty is enjoined by statute, by the Army regulations, safety manuals and directives above mentioned.*" (Emphasis added.) 270 F. 2d 110, 117.

Appellees in the present cases are basing their contentions on breaches of Air Force Regulations, which assume the same stature as did the Army Regulations in the *Kirk* case. The court's answer to Kirk's contention is equally applicable in these appeals (270 F. 2d 110, 117-118):

"The fatal weakness of appellants' position, as we see the problem, is that appellants have utterly failed to establish the existence of the legal duty upon which they rely. . . .

"Since the statute upon which appellants rely created no legal duty on the part of the United States, it necessarily follows that no legal duty on the part of the United States was created by regulations, manuals and directives purportedly au-

> thorized under the statute. Regulations of a department must be issued within the powers conferred by Congress and must be addressed to and be reasonably adapted to the enforcement of an Act of Congress. See 91 C.J.S. United States § 31, p. 68."

Appellees make no reference to any statutory authority stating that the Air Force Regulations in question created a legal duty to appellees herein. Furthermore, no statutory authority has been cited for the proposition that Air Force Regulations *per se* create a legal duty to others. This is understandable since none exists. As this court pointed out in the *Kirk* case, 270 F. 2d 110, 118, the force and effect of any regulation is determined by examining the statutory authority for its enactment.

AFR 55-19 and the various supplements implementing it, were enacted pursuant to the general provisions of 10 U. S. C., §8012, and 10 U. S. C., §8032, as pointed out in the Government's opening brief. It can readily be seen that neither of these statutes purports to establish a standard of care creating any sort of legal duty. Those statutes are broad general provisions outlining the Air Force "chain of command" and the corresponding duties and authorities of the Secretary of the Air Force and his subordinate air staff.

The definitive scope of 10 U. S. C. §§ 8012 and 8032, parallels that of 33 U. S. C., §701(b), as construed in the *Kirk* case. In both instances the secretary of an armed forces component was designated as director of certain activities and the discretionary responsibility for the carrying out of these activities

was placed with subordinates within the particular component (*i.e.*, the Chief of Engineers and the Air Staff). The "fatal weakness of appellants' position" in *Kirk*—reliance upon a non-existent legal duty—is patently present in the cases at bar. Accordingly, the appellees' contention that AFR 55-19 and its various supplements created a *standard of civil liability* should be dismissed under the rationale of the *Kirk* case:

> "The general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability. 50 Am. Jur. 582, Statutes, § 586." (270 F. 2d 110, 117.)

The Discretionary Function Exception as It Applies to the Civil Aeronautics Authority.

The substance of the arguments of both plaintiff appellees and United is that having granted to United's flight an IFR clearance, the CAA had a duty to warn United of the heavy traffic pattern in the Nellis-Las Vegas area and of the KRAM procedure. United cites *Indian Towing Co. v. United States,* 350 U. S. 61, and quotes therefrom the good Samaritan rule that one who undertakes a duty to warn the public and thereby induces reliance must perform his duty in a careful manner (Appellee United Br. p. 22).

The fallacy of the arguments of the appellees is that they attempt to distort the well defined and accepted meaning and scope of the term IFR clearance, and confuse rules of flight under IFR conditions and under VFR conditions. The simple fact is that an IFR clear-

ance ensures separation *only from other IFR flights under IFR conditions.*

If the midair collision in these cases had occurred under IFR conditions between United's flight and another craft cleared by the Civil Aeronautics Authority for IFR flight, the argument of appellees might have greater merit. However, the undisputed fact is that the collision occurred under conditions of unlimited visibility in which the flight of aircraft was governed by Visual Flight Rules (VFR).

The CAA Flight Information Manual in effect on April 21, 1958 [Ex. G-2], fully accords with the position of the Government as stated in its opening brief [Ex. G-2, p. 58]:

> "Traffic clearances will only provide standard separation between IFR flights. *During the time an IFR flight is operating in VFR weather conditions, it is the direct responsibility of the pilot to avoid other aircraft, since VFR flights may be operating in the same area without the knowledge of ATC."* (Emphasis in the original.)

In *United States v. Schultetus,* 5 Cir. 1960, 277 F. 2d 322, 327; the court said:

> " 'When flying in visual flight rule weather conditions, (*regardless of the type flight plan or air traffic clearance*), it is the direct responsibility of the pilot to avoid collision with other aircraft.' " [Quoting from Speiser, Preparation Manual for Aviation Negligence Cases 397.] (Emphasis added.)

And in the Government's Exhibit G-19 the position of the Civil Aeronautics Board regarding responsibility for avoidance during VFR conditions is stated:

> "The current provisions of Part 60 of the Civil Air Regulations classify all air traffic into two broad categories: (1) VFR, or that category of air traffic operating in weather conditions in which it is assumed that all pilots are able to see and avoid other aircraft, and (2) IFR, or that category of air traffic operating in weather conditions in which it is assumed that pilots are not able to see and avoid other aircraft. Weather conditions which limit the range of visibility of a pilot, therefor, are the principal factors determining the applicability of these rules."

It is therefore apparant that the issuance of an IFR clearance by the CAA to United's Flight No. 736 ensured separation from other aircraft *only* during conditions of low visibility, such as in fog or through clouds. Absent fog or clouds, the IFR clearance meant nothing, and separation from other aircraft depended upon the pilot and crew seeing and avoiding such aircraft.

If the argument of appellees is carried to a logical conclusion, their position is that negligence of the Government should be predicated upon an omission of the CAA to provide safeguards (in the form of warnings) for separation *during VFR conditions*; thus, to a degree, regulate the use of air space in VFR weather conditions, which is tantamount to positive air control, *i.e.,* positive separation from all other aircraft during all conditions of weather.

As the Government pointed out in its opening brief, the Civil Aeronautics Board, as a matter of policy, had refrained from implementing regulations providing for positive air control (although experimentation in this regard commenced in 1957), and that the Civil Aeronautics Board policy decision in this regard was a discretionary act within the meaning of the discretionary function exception to the Tort Claims Act. Warnings such as appellees claim should have been given, and the trial court found should have been given [F. 57; Govt. Op. Br. Appendix A, p. 19] are but a step into the area of positive air control—an area reserved by Congress to the Civil Aeronautics Authority, as the Government pointed out in its opening brief (Govt. Op. Br. pp. 34-35).

Appellees cite *United States* (*Eastern Air Lines*) *v. Union Trust Co.,* D. C. Cir. 1955, 221 F. 2d 62. In that case a Civil Aeronautics Authority control tower operator negligently performed his assigned duties—misfeasance. In the instant cases, it is undisputed that the Civil Aeronautics Authority employees were not negligent to the extent that they acted. The trial court finding [F. 57] and appellees claim is one of omission —nonfeasance, failure to do an act (warn) which the Civil Aeronautics Authority had not, by deliberate choice, assigned.

It can hardly be asserted that the Civil Aeronautics Authority personnel issuing an IFR clearance to United's Flight No. 736 had a duty (or that it was in their discretion) to decide whether or not to warn of the KRAM procedure. No doubt they issued an

IFR clearance pursuant to their instructions, and that that was the extent of their duty. On the contrary in *Eastern Air Lines* it was the assigned duty of the control tower operator to give or withhold clearance to the two aircraft involved to land. In the instant cases it is the policy of the Civil Aeronautics Authority which is found to be negligent. Thus, in *Eastern Air Lines* the actions of operating personnel are held negligent, and in the cases at bar, the decisions of the Civil Aeronautics Authority are found to be negligent. Clearly the cases are distinguishable.

The Measure of United's Contribution in the Wiener, Weil and Trujillo Cases.

The Government in its opening brief urged this court to reverse the trial court to the extent that contribution by United was limited to the amount of the jury verdict in *Wiener, Weil* and *Trujillo.*

United, in opposition to Government's position, cited *D. C. Transit Co. v. Slingland,* D. C. Cir. 1959, 266 F. 2d 465, and based upon the formula approved by the court in that case (Br. of Appellee United, pp. 35-36) asserted that the Government is in no position to complain about the limitation on the extent of its contribution imposed by the District Court.

There are, however, significant differences between *Slingland* and *Wiener.* In *Wiener* the greater verdict is against the Government and in *Slingland* the lesser verdict was against the Government. In *Slingland* the greater verdict exceeded the lesser verdict by 50 per cent, while in *Wiener* the greater verdict exceeds the lesser verdict by almost 300 per cent.

The plain effect of the court's award in *Wiener* ($128,430) was to render the jury verdict ($46,000) a nullity. Obviously plaintiffs in *Wiener* will seek payment of $128,430. The situation now is exactly as though plaintiffs in *Wiener* had originally brought their action against the Government as the sole defendant, and the Government had then joined United as a third party defendant for contribution. In such circumstances the measure of United's contribution would undoubtedly be one-half of the damages assessed to the plaintiff against the Government, *i.e.* $64,215.

The Government's action against United for contribution was brought pursuant to Title 28, U. S. C., § 1345, and was based upon common law principles of contribution. Plaintiffs' actions against United for damages are totally unrelated to and independent of the Government's cause of action for contribution. All issues involved in the Government's action for contribution were tried to the court, including the issue of United's negligence. As the court noted in its "Memorandum on Cross-Claims of United States of America and United Air Lines" (R. Wiener 2408 at 2410). ". . . the two defendants stipulated that trial be had to the court as to the respective cross-claims on the evidence produced before the jury on the question of liability." And further at 2410, "It is the duty of this court, as the trier of the facts between cross-claimants, to decide this case on the respective cross-claims on the evidence which was before it, . . ." It thus appears that while United's "common liability" to the plaintiffs could have been predicated upon the plaintiffs' jury action

against it, it chose to submit the issue of its liability for purposes of contribution against it to the court. It is for these reasons that the Government submits that the jury verdict of damages is wholly immaterial to the measure of contribution by United on the Government's independent cause of action. There exists no reason to depart from the rule that as between active joint tortfeasors, who are in *pari delicto,* liability is "a common burden in which the parties stand in *equali juri* and which in equity and good conscience should be equally borne." *George's Radio v. Capital Transit Co.,* D. C. Cir. 1942, 126 F. 2d 219, 222. The trial court made it clear in its findings of fact and conclusions of law on the cross-claims of each defendant against the other that the Government and United were active joint tortfeasors in *pari delicto* [F. F. 82, 84, 85; Concl. Law XI; Govt. Op. Br. Appendix A, pp. 26, 28]. Equity and good conscience demand that the burden is equally borne.

Post-Accident Changes in Air Force Regulations Concerning Practice Instrument Approach Procedures.

Plaintiff appellees represent in their brief that the control tower at Nellis was authorized to provide IFR service (Plaintiff Appellees' Br. p. 61). Their position in this regard is based upon testimony of General Caldara in 12 Rep. Tr. 1256-1262. A reading of the referenced testimony will, however, show that Nellis Control Tower personnel only had direct telephone communication capability with the Civil Aeronautics Authority Air Route Traffic Center in Salt Lake City.

Nellis personnel had no authority from the CAA to issue, as a source, IFR separation clearances [12 Rep. Tr. 1266-1267].

Plaintiff appellees and United both point to post-accident changes in the procedure of conducting practice instrument approach letdowns at Nellis, which required such flights to first obtain IFR clearances. However, as previously pointed out by the Government in this brief, internal Air Force policy matters are a "discretionary function"; and, additionally, Air Force Regulations, *per se,* cannot ground liability to plaintiff appellees or United under the rationale of *Kirk v. United States, supra,* 9 Cir. 1959, 270 F. 2d 110. Furthermore it is significant to note that the trial court's findings, detailed as they are, make no mention of post-accident changes inaugurated by the Air Force in connection with practice instrument approach letdowns. It can therefore be assumed that the trial court properly disregarded all evidence of post-accident changes as having no evidentiary value on the issue of the Government's negligence.

Other points raised by plaintiff appellees and United in their respective briefs do not, in the Government's view, require extended discussion. This court's attention is respectfully drawn to the Government's opening brief for its position in opposition thereto.

Conclusion.

Based upon its opening brief and this reply brief the Government respectfully urges this court to reverse the judgments and each of them (1) in favor of plaintiffs against the Government, and (2) allowing contribution to United; that if such reversals be denied, then the amount of contribution from United to the Government in the *Wiener, Weil,* and *Trujillo* cases be modified to the extent that the burden of plaintiffs' awards be shared equally by United and the Government.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

DONALD J. MERRIMAN